United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued By:

LEROY B. KELLAM, Esquire

In The

UNITED STATES COURT OF APPEALS

for the SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RICHARD PATTERSON,

Defendant-Appellant

Docket No.
74-~~2603~~
2063

DEFENDANT-APPELLANT's BRIEF

ON APPEAL

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PRELIMINARY STATEMENT

In The

UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

- against -

RICHARD PATTERSON,
Defendant-Appellant

The Defendant-Appellant (hereafter called "Appellant"), has appealed to this Court, as a matter of right, from a judgment of conviction, after a trial to the Court (Hon. Jack B. Weinstein, Presiding), with a jury, on May 7, 8, and 9, 1974, respectively, in the United States District Court for the Eastern District of New York, wherein the jury, after deliberation, returned a verdict finding the Appellant guilty of the crime of knowingly and intentionally attempting to distribute approximately one-eighth (1/8) kilogram of heroin hydrochloride, a Schedule II, narcotic drug, controlled substance, in violation of Title 21, United States Code, Sec. 841(a)(1); from the intermediate ruling of the trial Court denying the Appellant's

pre-trial motion to inspect the Grand Jury Minutes and to dismiss the indictment; from the intermediate ruling of the Court during the trial, after a "voire dire", overruling the Appellant's objections to the admission into evidence of an unsigned statement, purported to be the Appellant's voluntary statement made to the police after Appellant's arrest; from the jury's verdict as being against the weight of the evidence, and from so much of the charge to the jury as fails to instruct the jury with respect to the weight, if any, to be given the so called "Statement", allegedly made by the Appellant to the police, subsequent to his arrest, and from the sentence imposed upon the Appellant pursuant to the aforesaid judgment of conviction, by the Hon. Jack B. Weinstein, in the United States District Court, Eastern District of New York, on the 26th day of July, 1974, sentencing the Appellant to a term of six (6) years, as follows: six (6) months of incarceration, to be immediately followed by five and one-half ($5\frac{1}{2}$) years of special parole.

The Appellant is not on bail; he is currently

serving the six (6) months prison portion of the sentence, after which he will commence the parole portion of the sentence, unless otherwise directed by order of a Court.

Appellant submits this brief and appendix in support of his appeal from the judgment of conviction and the sentence herein, as well as from the aforementioned intermediate orders.

FACTS

The Appellant was arrested, early in the morning, on January 31, 1973, in Queens County, and charged on an affidavit, sworn to by Richard Slattery of the Bureau of Narcotics and Dangerous Drugs, sworn to the 31st day of January, 1973 before Vincent A. Catoggio, a United States Magistrate, in the Eastern District of New York, and charged as follows:

> "On or about the 30th day of January, 1972* within the Eastern District of New York, at La Guardia Airport, the defendant RICHARD PATTERSON and the defendant JUANITA BRYANT did unlawfully, knowingly and intentionally combine, conspire, confederate and agree

*Thus on the original affidavit--should be 1973

with each other to commit offenses against Title 21, United States Code, Sec. 841, by conspiring to distribute and possess with intent to distribute approximately 1/8 kilogram of heroin hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Sec. 846)."

The Appellant was subsequently indicted by a Grand Jury for the Eastern District of New York, on the 5th day of April, 1973 (DOOLING, J.), under Docket No. 73 CR 354, on a two count indictment, and charged as follows:

"COUNT ONE"

"On or about the 30th day of January, 1973, within the Eastern District of New York, the defendant RICHARD PATTERSON and the defendant JUANITA BRYANT did knowingly and intentionally conspire to commit offenses against the United States in violation of Section 841(a)(1) of Title 21, United States Code, by unlawfully, knowingly and intentionally conspiring to possess and distribute approximately one eighth (1/8) kilogram of heroin hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 846.)"

"COUNT TWO"

"On or about the 30th day of Janu-

ary, 1973, within the Eastern District of New York, the defendant RICHARD PATTERSON and the defendant JUANITA BRYANT did knowingly converted to their own use, approximately Two Thousand Five Hundred Dollars ($2,500.00), personal property of the United States. Title 18, United States Code, Section 641, Title 18, United States Code, Section 2."

The Appellant and his co-defendant on the aforementioned indictment went to trial on the charges in the said indictment in the United States District Court, Eastern District of New York, the Hon. JACK B. WEINSTEIN, Presiding, with a jury, on February 22, 25 and 26, 1974, respectively, which trial resulted in a hung jury. The indictment was dismissed, without prejudice, on motion of the Assistant United States Attorney prosecuting the case and the Appellant was discharged.

On April 2, 1974, the Appellant was reindicted by a Grand Jury in the Eastern District of New York, under indictment No. 74 CR 240, on a single count, WEINSTEIN, J., and charged as follows:

"On or about the 30th day of January, 1973, within the Eastern District of

New York, the defendant RICHARD PATTERSON, did knowingly and intentionally attempt to distribute approximately one-eighth (1/8) kilogram of heroin hydrochloride, a Schedule II, narcotic drug, controlled substance (Title 21, United States Code, Sec. 841(a)(1))." (A-1)*

The Appellant was duly arraigned on the Indictment on the 11th day of April, 1974, before Mr. Justice WEINSTEIN, in the United States District Court for the Eastern District of New York, at which time he duly entered a plea of "not guilty" to the indictment, and was released in his own recognizance, pending the trial of the said indictment (A-1).[1]

The indictment duly came on for trial in the United States District Court for the Eastern District of New York, before the Hon. JACK B. WEINSTEIN, and a jury, on May 7, 8, 9 and 10, 1974[2], and resulted in the Appellant's being found guilty as charged in the indictment. (A-1 through A-3).

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*References in parentheses refer to pages in the Appendix to Appellant's Brief.

[1] The stenograph record of the testimony at the arraignment proceedings was not furnished the Appellant; however, reference is made to the Appellant's bail status in item 6, pages 325-326, of the Index to the Record on this Appeal.

[2] See items 5, 5A, 5B, 5C, and 6, of the Index to the Record on Appeal, herein.

The Appellant then moved to set aside the verdict as being against the weight of the evidence, which motion was denied (A-3, A-4), and the Appellant was then released upon his own recognizance, over the objection of the Appellee, pending investigation and sentencing (A-4 through A-6).

The Appellant did not testify at the trial, nor did he enter any defense to the evidence offered by the Appellee at the trial.

During the trial, the facts adduced by the Appellee are as follows:

On the evening of January 30, 1973, at about 6:45 P.M., Special Agent William Simpson of the Drug Enforcement Administration, who was acting as an undercover agent made a telephone call from a public telephone at LaGuardia Airport, allegedly to the Appellant, in which the said Undercover Agent (hereafter called "SIMPSON") informed the person who answered the telephone (allegedly the Appellant) that SIMPSON's name was "MIKE" and that he was "DEE's" friend from Pittsburgh; that he had just arrived in

town to purchase one-eighth (1/8) kilogram of heroin for $5,000.00. SIMPSON made arrangements to meet the Appellant at the Alleghany Airlines Bar, at LaGuardia Airport (A-7 through A-15), at about 7:05 P.M.

The aforementioned telephone conversation was recorded by SIMPSON, without either the knowledge or consent of the person talking on the other end, who allegedly was the Appellant, on a tape and then transcribed. Both the tape and the transcript of the tape were admitted into evidence, over the objection of the Appellant, as Government's Exhibits 1 and 4 respectively (A-9 through A-12). Neither the tape nor the transcript of the tape mentions "DEE", who was referred to in SIMPSON's testimony (A-9) as being the key to his identification to the person speaking on the other end of the line.

After completing the aforementioned telephone conversation, SIMPSON reported to Special Agent RICHARD SLATTERY (hereafter called "SLATTERY") who was in charge of the team of Special Agents who were staked-out at the airport, pursuant to a preconceived and prearranged plan to observe and entrap the Appellant

in a sale of a narcotic drug (A-15 through A-17).

At about 7:10 P.M., the Appellant arrived at the airport in an automobile, accompanied by a female, later identified as Jaunita Bryant (A-17). Appellant entered the terminal and proceeded to the Alleghany Airlines Bar, where he met SIMPSON (A-18). Appellant and SIMPSON had a conversation in which SIMPSON asked Appellant if he had the package and the Appellant responded that he did not, but that it could be obtained in fifteen or twenty minutes. Appellant then suggested that they leave the bar and go to the men's room for further conversation; whereupon Appellant and SIMPSON left the bar and went to the men's room. Inside the men's room, Appellant mentioned to SIMPSON that Appellant had friends who had been arrested by undercover agents who were wearing KEL units on their bodies (A-19). Appellant then unbottoned his outtercoat and his shirt to show that he was not wired and asked SIMPSON if he could do the same; however, as SIMPSON commenced to do the same, another agent, PATRICK SHEA, entered the men's room, whereupon Appellant suggested

that they leave the men's room (A-20).

Outside the men's room, Appellant repeated that he could get the one-eighth kilogram of heroin in twenty minutes, but that he would need $2500.00. SIMPSON stated that he would not release any money until he received the whole package. Appellant then told SIMPSON that he could give the money to Appellant's girlfriend who was outside; that SIMPSON could give the money to her and let her pick up the package and that Appellant would stay at the airport with SIMPSON as security. SIMPSON agreed. Appellant then asked to see the money and SIMPSON took out an envelope and showed the Appellant the money; it was in $100 bills. They then proceeded outside the terminal and waved to the girl who was parked about 30 feet away; she drove up to them and SIMPSON told Appellant to go back inside the terminal and he got into the car to give the money to the girl (pp. A-21, A-22). SIMPSON entered the automobile, counted out $2500.00 and gave it to the girl (Juanita Bryant), who then asked to speak to the Appellant. SIMPSON asked for the $2500.00 back. She

returned the money to him and he got out of the automobile and called the Appellant. The Appellant walked over to the vehicle and spoke to the girl for a brief period; he then reentered the terminal building and indicated to SIMPSON that everything was "O.K.", and told SIMPSON to give her the money. Appellant and SIMPSON started walking towards the automobile when Appellant stated that he was going inside the terminal to copy down a number "just in case anything happens while she's getting the heroin". SIMPSON agreed and Appellant walked back inside and copied down a telephone number from a telephone booth. Appellant then came out, and both the Appellant and SIMPSON walked to the car and SIMPSON handed the girl $2500.00; the Appellant handed her the telephone number and she drove away from the area. Appellant and SIMPSON then reentered the terminal building and positioned themselves near the telephone booth (A-24) from which the Appellant had copied the telephone number (A-26).

While the Appellant and SIMPSON were waiting near the telephone booth they were approached and searched by some police officers, and while this search was going on the telephone rang in the booth, from which the Appellant had copied the telephone number; however, neither the Appellant nor SIMPSON was able to answer the telephone due to their involvement with the police (A-27, A-28, A-29); therefore, it is not known whether the call was from Appellant's

female companion or from someone else.

After the police incident, the Appellant became anxious and suggested to SIMPSON that SIMPSON could be a police officer; SIMPSON denied this possibility. Appellant then stated that he had seen a narcotics agent around the area named "DICK", and that Appellant didn't like the situation. Appellant made a telephone call and then stated that he was leaving the area. SIMPSON retorted that Appellant was not leaving unless SIMPSON either got back the $2500.00 or the package (A-30, A-31). Appellant then made another telephone call to an unknown person and SIMPSON allegedly overheard Appellant say that he did not like what was going on at the airport, and that the recipient of the call should get the money back and give the heroin back because Appellant was leaving the airport "now", (A-30, A-31). That the narcotics agent "DICK" referred to by the Appellant was Special Agent Dick Slattery, who was in charge of the operation (A-31, A-47) at the airport.

A heated argument then insued between the Appellant and SIMPSON because of SIMPSON's interest in recovering the money. Appellant allegedly told SIMPSON that if SIMPSON wanted the money he'd have to come with the Appellant and that Appellant was leaving "now" (A-32).

Appellant and SIMPSON left the airport and proceeded, by taxi, to the Showplace Bar on Farmers Boulevard, in St. Albans, Queens. The Appellant allegedly stated to

SIMPSON that his "girlfriend" would be in the bar and that he would check (he did not identify who his "girlfriend" was)* SIMPSON told Appellant that SIMPSON would remain in the taxi while Appellant looked inside for his girlfriend, whereupon, Appellant left the taxi and went into the crowded bar where he remained for about five minutes. Appellant came back to the cab and stated that the girl was not there and invited SIMPSON to have a drink. SIMPSON declined to have a drink and stated that he would remain in the taxi; Appellant reentered the bar. About twenty minutes later, SIMPSON went inside the bar and talked to Appellant, then returned to the taxi to await the arrival of Appellant's girlfriend (A-32, A-33).

After about fifteen minutes, SIMPSON sent the cab driver in to talk to Appellant; when the cab driver returned the driver and SIMPSON drove away from the bar and stopped at the nearest telephone booth in a diner at 188th Street @ Jamaica Avenue, where SIMPSON made a telephone call. SIMPSON was told by the other agents, whom he called from the booth, to wait at the diner (A-34).

Shortly after SIMPSON made the telephone call, Agent SLATTERY arrived at the diner and after talking to SIMPSON, dispatched some of his agents to cover the Hollis area and the vicinity of Appellant's residence and directed SIMPSON to remain at the diner and continue to make periodic calls to the Showplace Bar and to Appellant's residence (A-35).

*Information in parenthesis supplied by author.

Up to this time, Appellant had not been placed under arrest and had not been knowingly restrained in his movements; therefore, he was free to come and go as he chose.

At about 1:45 A.M., on the morning of January 31, 1973, SLATTERY and BARRETT were patroling an area on Farmers Boulevard, in Queens, aliting a Cadillac, which was stopped at the curb. The Agents pulled up adjacent to the Cadillac, SLATTERY got out and told Appellant that he was under arrest. SLATTERY then commenced to search and to frisk the Appellant. After the search and the frisk, SLATTERY handcuffed Appellant and escorted him to SLATTERY's vehicle and put Appellant in the backseat of the vehicle (A-36, A-37). The record does not state that the Appellant was given any reason or explanation for the arrest.

SLATTERY then got into the driver's side of the auto and BARRETT entered on the passenger side. SLATTERY then read to the Appellant his rights from a card - BND Form 13-A - which is Government's Exhibit 2, in evidence (A-38 through A-40). SLATTERY then asked the Appellant if he knew the whereabouts of "POOKIE" (Ms. Bryant). Appellant responded that he didn't know but that she had his automobile and that she had promised him $500.00 after the deal went down and he was looking for her to get his car back and possibly to collect some money. [1]

1] At the time this statement was allegedly made, there is nothing in the record to show that Appellant had been made aware of the fact that the arresting officers were aware of the transaction between SIMPSON and the Appellant, which involved Ms. Bryant and the $2500.00. This makes the answer suspicious if not improbable in view of the caution exercised by Appellant at all times, according to SIMPSON.

SLATTERY then asked Appellant's permission to go to Appellant's residence to look for Ms. BRYANT and/or the money; Appellant gave his consent,[2] and the parties proceeded to Appellant's apartment to await the arrival of Ms. BRYANT or a telephone call from her. Instead of finding Ms. BRYANT, they found another woman in the apartment.

After the passage of a period of time, without any word from Ms. BRYANT, SLATTERY stationed two other agents - MANGINO and CRAWFORD - at the apartment and then left with Appellant and the other agents to search the Farmers Boulevard area, with Appellant instructing them where to go (A-43). They did not find Ms. BRYANT, and at about 5:15 A.M., SLATTERY decided to cease the operation and notified the Agents at the apartment to discontinue the survielliance there and to proceed to Region 2 Headquarters at 90 Church Street. SLATTERY also proceeded to 90 Church Street with the Appellant and the other agents (A-44), arriving there at about 5:45 A.M.

At 90 Church Street, Appellant was photographed, fingerprinted, and processed (A-44). Appellant was then taken to SLATTERY's group area office and MANGINO and BARRETT questioned him (A-44-45). However, before commencing the questioning of the Appellant, BARRETT and MANGINO read to the

2] In view of the fact that the Appellant's residence was stated as being Kings County and he was stated to live at home with his wife and children and was paroled in his own recognizance on that basis. After the conviction, the parole was continued on the same basis, without any serious objection from the Government.

Appellant BND-Form 13 (Government's Exhibit 3, in evidence), which is a Statement of Rights and Waiver, in the presence of SLATTERY (A-45, A-46 and A-49) and the other agents.

SLATTERY and his group, including his supervisor, Assistant Regional Director JAMES P. HUNT, had made all of the plans relative to the effort herein to entrap the Appellant prior to the January 30, 1974 rendevous with the Appellant at LaGuardia Airport (A-47); however, because SIMPSON had advanced a portion of the $5000.00 given to him to make the purchase, SLATTERY had to write a report, which he did during the time that BARRETT and MANGINO were questioning the Appellant (A-46), SIMPSON's specific instructions were not to "front" (advance) any of the money (A-48).

Appellant refused to sign Government's Exhibit 3, in evidence (A-51), but it is signed by Agents MANGINO and BARRETT as witnesses, with a legend in longhand and purportedly signed by Agent MANGINO, stating the Appellant's refusal to sign the document.

Appellant allegedly agreed to give a statement, but stated that he would not sign the statement until after he conferred with Counsel (A-52, A-54). The questions were asked by Agent MANGINO and the answers were written down by Agent BARRETT (A-51, A-53).

The trial Court admitted the statement into evidence over the objections of the Appellant (A-55, A-57), although the testimony regarding its content had been very scanty and superficial and dealt sparsely with the content of the statement[1]. Once the statement was admitted into evidence, Appellant adhered to his initial objection, but did not object to its being distributed to the jury, rather than being read into the record (A-58, A-59).

At the end of the Government's case, the Appellant moved to dismiss the indictment (A-60, A-61), which motion was denied. The Appellant then rested and moved for a directed verdict, on the ground that the

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1 In admitting the statement into evidence, the trial Court cited two sections of the "proposed" Rules of Federal Procedure, which have not been adopted, though they have been proposed since April, 1970. Clearly this is no basis for admission of the document.

Government had failed to prove the Appellant's guilt beyond a reasonable doubt. The motion was denied (A-62, A-63).

At the outset, the Appellant moved for an inspection of the Grand Jury minutes and to dismiss the indictment on the grounds of insufficiency of the evidence before the grand jury (A-64), which motion was denied by the Court without inspecting the said Grand Jury minutes, which are in evidence as Defendant's Exhibit A (A-65, A-66, A- 99through A-101). After Appellant was given access to the Grand Jury minutes, Appellant renewed his motion to inspect the Grand Jury Minutes and to dismiss the indictment (A-67 through A-71), which motion was denied.

Also, at the outset Appellant requested and was granted a hearing with respect to the voluntariness of a statement allegedly given by the Appellant to the Special Agents under rather bizzare circumstances (A-52 through A-59), which was not signed by the Appellant and no waiver had been given by the Appellant prior to the alleged taking of the statement (A-72 through A-76).

The motion was denied (A-77) by a finding that there was an "intelligent waiver of his right to Counsel, of his right to keep silent or any of the other rigths that were allegedly* read to him". The Court then went on to say, "I find the defendant was fully apprised of his rights. He was not in any way coerced, he was not intoxicated, and there is no reason to suppress. The motion is denied". (A-77).

In its charge to the jury (A-79 through A-87) the learned Trial Court failed to give a definitive, intelligible definition of "reasonable doubt" (A-81), and failed to make any specific charge with respect to the so called "Statement" or "Confession", that is, as to the weight it should bear, whether or not corroboration was necessary, and the like; nor does the charge in any way advise the jury with respect to what it must find in the relationship between the Appellant and Ms. BRYANT, in order to determine the guilt or innocence of the Appellant.

Shortly after the jury commenced its delib-

* Emphasis supplied by author; however, the language is that of the Trial Court.

eration, it sent out a request for Government Exhibits 1, 4, and 5, which are the cassettes containing the taped telephone conversation between Appellant and SIMPSON, the transcript of the tape and the yellow sheets containing the hand written statement which Appellant allegedly gave to Agents BARRETT and MANGINO (A-88, A-89, A-102); they then asked to have the tape played back for them (A-90).

The jury then sent in an inquiry as to whether or not the telephone number called by SIMPSON had been confirmed as belonging to the Appellant. After consideration of the question, the Court decided that there had been no such confirmation on the record and referred the jury to Government's Exhibit 5 (the statement) for the indirect references it made to the telephone (A-91 through A-96; A-102). Also, the jury had trouble with the definition of "reasonable doubt" stated in the charge. Reasonable doubt was redefined to him in the same terms as defined in the charge (A-97).

QUESTIONS PRESENTED

1. Did the learned Trial Court commit reversible error by refusing to entertain the Appellant's motion to inspect the Grand Jury Minutes and to dismiss the indictment on the ground that the evidence before the Grand Jury was insufficient to support the indictment of the Appellant?

2. Is it reversible error for the learned Trial Court to admit into evidence, as Government's Exhibit #5, a statement, written by one of the arresting agents, in his own handwriting, where it is established that the Appellant refused to sign a waiver of his Miranda Rights and refused to sign the statement after it was written, on the ground that he would not sign anything until after he conferred with Counsel concerning it, as a pre-trial statement by the Appellant?

3. Is it reversible error for the learned Trial Court to allow into evidence as Government's Exhibits 1 and 4, respectively, the tape and the transcript of the tape of the record of a telephone call made by Agent SIMPSON to someone alleged by the Govern-

ment to have been the Appellant, when the taping of the conversation was made by one of the alleged parties to taped conversation, without either the knowledge or consent of the other party and where no third party was listening in on the deceitful telephone conversation, with the consent of one of the parties to the taped conversation?

4. Is the judgment against the weight of the evidence, and if so, was it reversible error for the learned Trial Court to deny Appellant's motion for a directed verdict at the end of the trial?

STATUTES INVOLVED

Title 21, U.S. Code, Sec. 812(b) (2)(A), (C); Title 21 U.S. Code, Sec. 841(a)(1); Title 21, U.S. Code, Sec. 846; Title 18, U.S. Code, Rule 12(b) (2) and (3); United States Constitution, Amendment Number Five; Rule 801(d), of the Federal Rules of Procedure; Rule 803(5), of the Federal Rules of Procedure; Rule 8-01(d) of the Proposed Federal Rules of Procedure (46 F.R.D. 161); Rule 8-03(5) of the Proposed Federal Rules of Procedure (46 F.R.D. 161).

ARGUMENT

POINT I

IT WAS PREJUDICIAL AND REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY APPELLANT's MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS THE INDICTMENT.

A motion to inspect Grand Jury Minutes and to dismiss the indictment for a failure to charge an offense, or for lack of jurisdiction in the Court is governed by Rule 12(b)(2) of the Federal Rules of Criminal Procedure (18 U.S.C., Rule 12(b)(2)). That rule provides that defenses and objections based on defects in the institution of the prosecution or in the indictment or information, other than that it fails to show jurisdiction in the Court, or to charge an offense, may be raised only by a motion before trial; these two objections shall be noticed by the Court at anytime during the pendency of the proceeding.

The said rule 12(b)(2) further provides that where defenses and objections to the indictment, except for the two instances above stated, are not made prior to the trial, they are deemed waived, but that the

Court, for good cause shown, may grant relief from the waiver. And, Rule 12(b)(3) of Title 18, U.S.C., provides that a motion shall be made before the plea is entered, but the Court may permit it to be made within a reasonable time. The motion contemplated by the rule is an omnibus motion encompassing all defenses and objections to the indictment.

In U.S. v. Rosenman, D.C. La. (1968), 291 F. Supp. 867, it was held that "reasonableness", with respect to timeliness of motions made after the entry of a plea asserting a defense, depends upon all circumstances surrounding the case and that the "non-waivable defenses (to wit: lack of jurisdiction and failure to charge an offense)*" may be raised at anytime, but not later than at the trial itself.

The Appellant motion herein was made at the trial, due primarily to the circumstances. Here, the Appellant was indicted on April 5, 1974, and was called in to plead to the indictment on April 11, 1974

* Information in parenthesis supplied by writer.

(A-1), at which time, the Court, instead of extending the date of the plea in order to allow the Appellant time to make motions, accepted a plea of "not guilty" from the Appellant. In less than a month, to wit: on May 7, 1974, the trial of the indictment commenced. However, prior to the taking of any testimony, Appellant moved, orally and in open Court, for an inspection of the Grand Jury Minutes and for a dismissal of the indictment. The learned Trial Court summarily denied the Appellant's motion, alluding to a prior trial of another indictment, which had no bearing on the indictment on which Appellant was currently about to stand trial.

In the course of the trial, Appellant was given access to the Grand Jury Minutes, and, upon reading them, moved again for a dismissal of the indictment. The Grand Jury Minutes revealed that the only witness to testify before the Grand Jury was Agent SIMPSON (A-98 through A-101), who testified substantially as follows:

On the 30th day of January, 1973,

he called the Appellant, by telephone, for the purpose of letting the Appellant know that he (SIMPSON) was in town and ready to purchase 1/8 kilogram of heroin for $5000.00; that he made arrangements to meet Appellant at LaGuardia Airport, Alleghany Airlines; that he had in his possession $5000.00, and that he did meet the Appellant at the designated point; that he gave $2500.00 to Appellant's girlfriend, JUANITA BRYANT, and made arrangements with her; whereby she was to pick-up one eighth (1/8) kilogram of heroin while SIMPSON and the Appellant waited for her at the airport; that JUANITA BRYANT never returned to the airport with either the heroin or the money; that he was later advised that both the Appellant and Ms. BRYANT had been apprehended and placed under arrest; that he knew that Ms. BRYANT had pleaded guilty to a misdemeanor, charging her with possession of heroin on January 30, 1973.

The foregoing Grand Jury testimony is patently inaccurate and prejudicial and was obviously designed to procure an indictment of the Appellant based on prejudice, rather than the facts.

To begin with, testimony makes it appear

that the witness, SIMPSON, gave $2500.00 to the Appellant (A-100, lines 12-15), and $2500.00 to Ms. BRYANT (A-100, lines 16-19), when all of the other testimony and documents show that the agent gave Ms. BRYANT $2500.00 as an advance to purchase heroin. Secondly, SIMPSON characterizes Ms. BRYANT as being the Appellant's "girlfriend". SIMPSON was fully aware - as one of the agents on duty on the night of January 30, 1973 and the morning of January 31, 1973, that the Appellant only knew JUANITA BRYANT as being the girl who was to get the package of heroin for SIMPSON (A-102). Thirdly, SIMPSON, did not inform the Grand Jury that he made the deal with JUANITA BRYANT, if indeed a deal was made, outside of the hearing of the Appellant and that he gave her money outside of the presence of the Appellant. The record shows that NANCY BROWN allegedly was the Appellant's girlfriend. In any event, since there is no charge of either a conspriacy or acting in concert involved herein, the use of the word "girlfriend", is highly prejudicial and denotes some form of collusion between the Appel-

lant and JUANITA BRYANT.

In likemanner, the testimony that JUANITA BRYANT never returned to the airport, with the heroin is prejudicial. That testimony is designed only to inform the Grand Jury that the agent, SIMPSON, lost $2500.00, - which fact - if indeed it is a fact - has no bearing upon the charge herein since the Appellant is not accused of larcency and no indictment for larcency was sought. Needless to say, the missing $2500.00 is the "sine qua non" of this indictment and of the prosecution, all to the prejudice of the Appellant.

For SIMPSON to testify that he was "later advised" that both the Appellant and Ms. BRYANT had been apprehended and arrested is clearly misleading, since he did not differentiate as to the time and place. SIMPSON was a principal part of the team which arrested the Appellant on the very night of the alleged offense. Therefore, it was false testimony for SIMPSON to so testify, without also relating the fact that both the Appellant and Ms. BRYANT had been

indicted on two counts of conspiracy and that the trial of that indictment resulted in a hung jury. With respect to Ms. BRYANT's arrest, the circumstances are now nebulous; however, according to Official Government records, in evidence, she was arrested in Boston, Mass., on another charge in February, 1973; and after trial and sentencing there, was returned to the Eastern District of New York on a warrant.

Finally, SIMPSON's concluding testimony before the Grand Jury that Ms. BRYANT had pleaded guilty to the misdemeanor of "possession of heroin" on January 30, 1973, was highly prejudicial to the Appellant and was clearly evidence which had no competency before that Grand Jury. Her plea, to whatever crime or offense, is not binding upon the Appellant. This is particularly true since they were not convicted of the alleged conspiracy and no conspiracy or acting in concert indictment was being sought before this Grand Jury. Furthermore, she was not arrested on January 30, 1973, and for all purposes, the testimony, tangible evidence, and official reports in the trial

clearly indicate that there was no heroin ever seen on that night (January 30, 1973) by any of the agents or either the Appellant or Ms. BRYANT. No indictment of Ms. BRYANT was being sought. Obviously, then, the testimony was adduced solely for its shock value to the Grand Jury in order to prejudice it against the Appellant in order to procure the resultant indictment.

Also, there was no testimony to the Grand Jury that all that allegedly happened on the evening of January 30, 1973, and the morning of January 31, 1973, was the result of a plan conceived and put into operation by the government solely for the purpose of inducing the Appellant to commit a crime and the plan backfired at a cost of $2500.00, plus all of those man hours to the government and the government now seeks to punish the Appellant for the failure of its plan and the loss of its money.

Agent SIMPSON had sufficient reason to be less than candid with the Grand Jury. He was entrusted with funds with specific instructions on how to handle

them. He was told not to advance any money under any circumstances and not to leave the airport under any circumstances. He violated both instructions with the resultant loss to the government. The degree of his accountability for these transgressions, financially, is not known, but it is reasonable to assume, that if an indictment and conviction resulted from the activity, then the government would not suffer a total loss and SIMPSON's record would be a little less blemished.

It is well established law and this Court can take judicial notice of the fact that the evidence before the Grand Jury must be of such quality as to be admissible in a trial, and must be of such weight that, if left uncontroverted, would result in the conviction of the defendant by showing his guilt beyond a reasonable doubt.

Appellant respectfully submits, that had the Court entertained his application to inspect the Grand Jury Minutes and to dismiss the indictment based upon its failure to state an offense, due to irregu-

larities in the Grand Jury proceedings, the Trial Court, after applying the foregoing rule would have been compelled to dismiss the indictment and that it was reversible error for the learned Trial Court to deny the Appellant's motion, aforementioned.

POINT II

THE ADMISSION INTO EVIDENCE AND THE DISTRIBUTION TO THE JURY OF COPIES OF GOVERNMENT's EXHIBIT 5, AS A PRE-TRIAL STATEMENT, CONFESSION, AND/OR ADMISSION BY THE APPELLANT IS PREJUDICIAL AND REVERSIBLE ERROR AND SHOULD BE REVERSED.

The Appellant asked for and was granted, at the outset of the trial and before any testimony was taken before the jury, a Miranda hearing to determine the voluntariness of a statement which the Appellant had just learned that the Government intended to use at the trial. Since the Appellant had no prior knowledge of the government's intention to use the statement, it was not urged that the Appellant's application for such a hearing was untimely; therefore, the timeliness of the application is not in issue, and if it were, the same arguments advanced

under the preceding POINT I, with respect to Motions under 18 U.S.C. Rule 12(b)(2) and (3), would obtain.

At the hearing, it was brought out that the statement was written in longhand by Agent BARRETT based upon questions asked the Appellant by Agent MANGINO, at about 6:10 A.M., on the morning of January 31, 1973, just after the arrest of the Appellant. The Appellant was first "processed", and then Agents BARRETT and MANGINO read to the Appellant his rights to remain silent, his right to Counsel prior to making a statement and his right to waive all of the aforementioned constitutional guarantees and to make a statement. The said rights were read to the Appellant from a standard form BND-13, used by the government for the purpose of obtaining waivers, and is in evidence as "Government's Exhibit 2, on the Suppression Hearing (A- 38)". At the end of the warning of rights, is a form of waiver which the Appellant was asked to sign prior to any statement being taken from him. Appellant refused to sign the waiver until after he consulted with Counsel; therefore,

each of the interrogating Agents signed a separate statement, written in longhand across the face of the said exhibit to the effect that the Appellant refused to sign the waiver; then, each of the Agents - BARRETT and MANGINO signed the form in the space provided for the signatures of two witnesses.

The Agents testified that they then asked the Appellant if he would give them a statement; the Appellant allegedly testified that he would give a statement but that he would not sign it until he consulted Counsel.[1] The record does not show that the officers consulted anyone to determine whether or not they could take Appellant's statement in view of the fact that he allegedly predicated everything upon consultation with Counsel. There is nothing in the record to show that Appellant ever stated, verbally or in writing, that he waived his right to Counsel at that point in the proceedings.

1 The testimony is inconsistent with the Appellant's general deportment during the course of that evening. The record shows that he was suspicious of everyone from his first contact with SIMPSON, when he asked SIMPSON if he were wired. Appellant also left the airport after the encounter with Airport Police, and his having seen Agent SLATTERY, because he didn't like the looks of things. He was obviously alert and well acquainted with police procedure. He certainly showed no predisposition to want to get involved with the police, to say nothing of confessing to them.

The Agents proceeded to take the statement. Although it is alleged that Agent MANGINO asked the Appellant specific questions, the questions are not recorded, the statement is written in narrative form and introduces background information not mentioned in the record, relating to telephone conversations held by the Appellant with third-parties prior to January 30, 1973, concerning an arrangement similar to that carried out on January 30, 1973 (A-102). This is significant because this information was never furnished to the Grand Jury and is not a part of the testimony of any of the Special Agents.

Appellant respectfully submits, that in order for the Agents to have knowledge of those prior conversations so as to arrange the meeting of January 30, 1973, they would either have had to arrange the prior calls, or to have had illegally obtained wiretap information, which they did not want to bring to the attention of the Court and Jury, or they must have had an informer.

Appellant allegedly refused to sign the

statement until after he consulted Counsel. Allegedly, he did acknowledge the accuracy of its content.[2]

Appellant respectfully submits, that all of the foregoing is but an effort to make the statement admissible in evidence, as having been adopted by the Appellant and as being Appellant's voluntary statement.

The Appellant's right not to be compelled to give testimony against himself, or to incriminate himself is a constitutional right protected by the Fifth Amendment to the United States Constitution. Such a right cannot be waived by indirection and subterfuge. There are standards which must be followed in order to effect a waiver of such a right. However, here the learned Trial Court has interpreted a farsical comedy of errors as an effective waiver of such a right, and has allowed the document itself into evidence and to be distributed to the jury as being the Appellant's voluntary statement or confession without any proof that it is in fact the Appellant's statement, voluntarily made under a waiver of his rights.

2 See footnote "1", supra.

Since the Appellant's contention was, at all times alleged to be that he would not sign either the statement or the waiver until after he consulted Counsel, it is clear that he did not waive and had no intention of waiving his right to Counsel. Therefore, if the giving of a statement under such circumstances is interpreted as being a waiver of the right to Counsel and of the right not to incriminate himself, the Appellant should have been apprised of that fact prior to the statement having been taken from him. In addition no testimony was ever given that the Appellant's signature was ever sought on either the waiver or the statement subsequent to the time Counsel was assigned to him, or that Appellant's Counsel was ever apprised of the existence of the statement and asked to have the Appellant sign it. It is clearly stated in the record that the statement was not used in the trial of the conspiracy indictment and the Appellant was not advised that it would be used in this trial until the morning of May 7, 1974, just before the trial commenced. Query, did the Government adequately warn the Appellant of his

Miranda rights, in the light of the peculiar circumstances of this proceeding? Appellant respectfully urges that the Government did not.

In Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, in which the Appellant returned to the narcotic authorities and voluntarily made a statement, after he had been released in his own recognizance, but refused to sign the statement until one of the co-defendant's was released on bail, the U.S. Supreme Court BRENNAN, J., held the statement admissible into evidence because Wong Sun by his actions understood what he was doing, and adopted its substance and never suggested any impropriety in the interrogation itself which would require exclusion of the statement.

Clearly, this is not the case at bar, and under the circumstances herein, the rule should be enforced as it is, to wit: that the statement is inadmissible because the Appellant never waived his Miranda rights.

For purposes of this appeal, it is the

law of this case that the statement referred to herein is hearsay, and the Trial Court referring to Rule 8-01 (d) and 8-03(a) and (b)(5) of the Proposed Rules of Evidence for the United States District Courts and Magistrates (46 F.R.D. 161).[1] Section 8-03 states as follows, in so far as pertinent:

> "(a) General Provisions. A Statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.
>
> "(b) Illustration. By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule:
>
> . . . . . .
>
> "(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made when

1 It is significant to note that these two statutes are mere proposals which have never been adopted and therefore have no standing as a basis for the admission of evidence. They are the proposed substitutes for Sec. 801(d) and 803(5) of the Federal Rules of Evidence. The Justice who presided at the trial herein is one of the 15 members of the Advisory Committee in charge of promoting the said proposed rules.

the matter was fresh in his memory and to reflect that knowledge correctly. The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party."

The present Section 803(5) of the Federal Rules of Evidence, now in use, reads exactly the same as subdivision (b)(5), above; however the current rule has no subparagraph "(a)". Instead, it begins as follows:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:. . ."

The essential difference between the two rules is that the proposed rule qualifies the absolute language in the current rule.

Furthermore, the said proposed rules of Evidence, aforementioned, under Section 8-01, thereof, which sets forth definitions of the terms used in the rules, provides as follows:

"Rule 8-01. Definitions

"The following definitions apply under this Article:

"(a) Statement. A "statement is (1) an oral or written assertion. . . .

"(b) Declarant. A "declarant" is a person who makes a statement.

"(c) Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter asserted, unless

. . . . . .

(3) Admission by party-opponent. The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, or (ii) a statement of which he has manifested his adoption or belief in its truth, . . . "

And the current rule, to wit: Rule 801 of the Federal Rules of Procedure, under subdivisions (a) and (b) thereof, defines "statement" and "declarant" in the same manner as the terms are defined in the proposed new rule; however, "hearsay" is defined as follows, in that statute:

"Rule 801. Definitions

"The following definitions apply under this article:

. . . . . .

"(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted;"

and, subsection (d)(2) of that rule, states:

"(d) Statements which are not necessary: A statement is not hearsay if -

. . . . . .

> "(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or (B) a statement of which he has manifested his adoption or belief in its truth; . . . "

Clearly, the current rule has a more readily understandable definition of "hearsay", and the statement herein does not qualify for admission under either, since the record is clear that the Appellant refused to adopt either the statement or the waiver as his own at the time they were presented to him and nothing in the record either establishes or suggests that the Appellant altered his position with respect to them subsequent to January 31, 1973.

Therefore, the only purpose for which the government could use the statement was to refresh the recollection of its witnesses.

Rule 26 of the Federal Rules of Criminal Procedure requires that all testimony of witnesses at trials be taken orally, unless otherwise directed by an act of Congress. The admissibility of evidence should be governed by the common law principles as

they may interpreted by the Courts of the United States in the light of reason and experience. The provision applies also to the competency and privileges of witnesses (18 U.S.C., Rule 26).

Here, the witnesses who allegedly took the statement from the Appellant were unable to testify to its content with any degree of accuracy; yet, instead of refreshing their recollection with the statement, the statement was admitted into evidence and distributed to the jury. Concededly there is a wealth of cases standing for the proposition that a statement voluntarily given is admissible (Love v. U.S., C.A. N.D. (1967), 386 F. 2d 260, Cert. denied 88 S. Ct. 111, 390 U.S. 985, 19 L. Ed 2d 1286; Landsdown v. U.S., C.A. La. (1965) 348 F. 2d 405); however, each of these cases is distinguishable from the case at bar for the reason that the Appellant herein never waived his rights either to Counsel or against self-incrimination. Deponent respectfully submits that if such duplicity can be practiced by the government or any other litigant against another, then that statute al-

lowing such practice is repugnant to the Constitution of the United States and should be declared null and void.

Another argument for the suppression of the statement is the fact that the arrest herein was illegal. On the Government's prima facie case, the witness SLATTERY who allegedly arrested the Appellant, merely stated to the Appellant that the Appellant was under arrest. No reason for the arrest was ever given the Appellant, and, from the record, there appears to have been nc probable cause for the arrest at the time it was made. (Wong Sun v. United States, supra.)

In Wong Sun, supra, Mr. Justice BRENNAN stated at page 413 of 83 S. Ct.

> "The quantum of information which constitutes probable cause and hence which would "warrant a man of reasonable caution in the belief" that a felony has been committed - Carroll v. U. S., 267 U.S. 132, 162, 45 S. Ct. 288, 69 L. Ed. 543 - must be measured by the facts of the particular case."

When the arrest herein is examined in the light of the foregoing and of the other rulings and

dicta in Wong Sun, it becomes clear that the Appellant's arrest was illegal and, accordingly an act done pursuant thereto, including the taking of the statement herein is void. (Wong Sun v. U. S., supra.)

For the foregoing reasons, it was error for the learned Trial Court to admit the statement into evidence and the statement is constitutionally tainted by reason of the illegal arrest and of the illegal use of wire tap and wire tap information by the Government. (United States v. Ryan, C.A. 5 (Fla. 1973) 478 F. 2d 100 8; United States v. Moore, C.A. 9 (C.D. Calif., 1968), 401 F. 2d 533.)

POINT III

IT IS REVERSIBLE ERROR FOR THE TRIAL COURT TO ADMIT INTO EVIDENCE GOVERNMENT's EXHIBIT 1 AND 4, RESPECTIVELY.

Over the objection of the Appellant, the learned Trial Court admitted into evidence a cassette tape, as Government's Exhibit 1, and a what purports typewritten transcript of the tape, as Government's Exhibit 4. The tape purports to be a recording of the alleged telephone conversation between the Appellant

and SIMPSON on the evening of January 30, 1973, at about 6:45 P.M. The conversation was recorded by SIMPSON, without either the knowledge or consent of the Appellant and there was no third-party listening in on the conversation. Therefore, there was no consent by either of the two conversants to have a third-party listen in.

SIMPSON testified that he had never heard Appellant's voice either on the telephone or in person prior to the evening of January 30, 1974. The record shows that the telephone on which Appellant allegedly received the call was registered to one NANCY BROWN, and not to the Appellant. None of the agents testified as to how they came to call the Appellant on the evening of January 30, 1973, and only Agent SLATTERY admitted having known the Appellant prior to the 30th of January, 1973.

In order for the tape to be admissible in evidence someone must identify the Appellant as being the person to whom SIMPSON spoke on the telephone (U.S. v. Pullings, 321 F. 2d 287) and the mere

announcement of his identity by a person who has placed a telephone call does not make it admissible against the person identified (U. S. v. Benjamin, 328 F. 2d 854).

There was no repetition of calls and/or conversations on the telephone between SIMPSON and the Appellant; yet SIMPSON was able to identify the Appellant's telephone voice.

In addition, there is nothing in the tape nor on the transcript thereof, which in any way explains how the Appellant, or the person purporting to be the Appellant knew who the caller was or why he called. In short, other than the fact that the second person who came to the phone stated that he was the Appellant, and the statement in the alleged confession (Exhibit 5, in evidence) about Appellant having received the telephone call. Neither the telephone nor the automobile has been proven on the record to be the property of the Appellant.

Therefore, the taped telephone conversation without the alleged statement (Exhibit 5, in evidence) is of no value and the tape and transcript

were improperly admitted into evidence.

POINT IV

THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE, AND IT WAS ERROR FOR THE COURT TO DENY THE APPELLANT's MOTION FOR A DIRECTED VERDICT.

The government's case against the Appellant must stand or fall, based upon the taped telephone conversation (Exhibit 1), the transcript of that conversation (Exhibit 4), and the alleged confession (Exhibit 5). As argued under preceding points, most - if not all of that evidence is tainted with unconstitutionality in that it was illegally procured. Therefore, even if such evidence remained in the action, (Gay v. U. S., (C.A. 8, Iowa, 1969), 408 F. 2d 923. In addition, those documents, in order to be corroborated and their competency as evidence must be established on the Government's direct case (Landsdown v. U. S., supra).

Appellant respectfully submits, that except for the foregoing exhibits, there is nothing in the record sufficient to support any charge of an

offense against the Appellant under the indictment herein. This is particularly true since the case against the Appellant must stand or fall, based upon Appellant's individual acts and not upon the acts of any other person - including Ms. BRYANT, involved in the episode of January 30, 1973.

The Court can take judicial notice of the fact that in a criminal prosecution, the burden is upon the government to prove every element of the case beyond a reasonable doubt.

The primary elements of the attempted crime charged in the indictment herein is "knowledge" and "intent". The record is free of any testimony or evidence showing that the Appellant at anytime during the evening of January 30, 1973, was guilty of either of these elements beyond a reasonable doubt. Other than the tape and transcript and the alleged confession, the record is completely barren of any evidence that would even suggest a criminal offense.

Additionally, there has been no corroboration of the so called confession and none of the tape,

except testimony by the arresting agents, all of whom had motive to fabricate testimony and evidence in this action, in order to justify the loss of $2500.00.

Therefore, it was reversible error for the learned Trial Court to deny the Appellant's motion for a directed verdict.

Black's Law Dictionary, Third Edition, at page 676, defines error as follows:

> "Such a mistaken or false conception or application of the law to the facts of a cause as will furnish ground for a review of the proceedings upon a unit of error; a mistake of law or a false or irregular application of it, such as vitiates the proceedings and warrants reversal of the judgment" . . .

And, the said Dictionary, at page 678, thereof, defines reversible error, thusly:

> "In appellate practice, such an error as warrants the appellate court, in reversing the judgment before it; substantial error; that which reasonably might have prejudiced the party complaining (Condello v. U. S., (C.C.A.) 297 F. 200, 201, Sherin v. United Ry.

Co. of St. Louis, 248 Mo. 173, 154 S.W. 103, 105; New Mexican R. Co. v. Hendrix, 6 N.M. 611, 30 Pac. 901).

Clearly the error herein is reversible error within the foregoing definition.

CONCLUSION

The ruling denying the Appellant's motion to inspect the Grand Jury Minutes should be reversed, and the matter remanded for a hearing to determine the sufficiency of the indictment; the ruling denying the Appellant's motion to suppress the statement and/or confession should be reversed, and the instrument should be suppressed; the ruling of the Trial Court admitting into evidence the taped telephone conversation of January 30, 1973, and the typewritten transcript thereof should be reversed and the tape and transcript should be excluded from evidence in this action; and the judgment should be set aside as being against the weight of the evidence, and Ap-

pellant should have a directed verdict dismissing the indictment with costs and disbursements on this appeal.

Dated: St. Albans, New York,
November 11, 1974.

Respectfully submitted,

LEROY B. KELLAM
Attorney for the Appellant.